Supreme Court, U. S.
FILED
AUG 24 1979
MICHAEL RODAK, JR., CLERK

No. 78-1323

In the Supreme Court of the United States

OCTOBER TERM, 1978

NORFOLK AND WESTERN RAILWAY COMPANY,
Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,
Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

BRIEF FOR RESPONDENT

RICHARD S. FLEISHER
TONI McNAMARA
KARLIN AND FLEISHER
111 West Washington Street
Chicago, Illinois 60602
(312) 346-8620
Attorneys for Respondent

Of Counsel:
SIDNEY Z. KARASIK
134 South LaSalle Street
Chicago, Illinois 60603
(312) 782-7295

August, 1979

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

TABLE OF CONTENTS

	PAGE
Table of Authorities	iii
Questions Presented	1
Statement of the Case	2
Summary of the Argument	2
Argument	6
I. Introductory Statement	6
II. It Was Not The Intent Of Congress That State, As Well As Federal Courts "Strictly Limit" Recoveries In Wrongful Death Actions To The Value Of The Net Pecuniary Loss Suffered By Decedent's Beneficiaries	7
A. An Admitted Negligent Railroad Should Not Obtain the Benefit of the Humanitarian Exclusion of Personal Injury Damage Awards from Tax Liability	8
B. The Deduction of Future Taxes from Prospective Lost Wages is a Half Measure Designed to Defeat Full Recovery to the Respondent as Mandated by the F.E.L.A.	12
C. Petitioner's Contention that Respondent's Recovery Should be "Strictly Limited" and Determined on the Basis of Net Pecuniary Loss is Not Well Founded	14
III. The Deductions To Which The Admitted Wrongdoer Claims To Be Entitled Are So Speculative That Any Attempt At Calculation Would Severely Prejudice The Respondent And Deny Full Recovery	16

PAGE

IV. Permitting Speculation On The Impact Of Future Taxes Will Radically Alter The System Of Injury Compensation Throughout The Entire Country 20

V. If Taxes Are To Be Deducted From Personal Injury Awards Other Offsetting Factors Must Be Taken Into Account To Make The Plaintiff Whole 23

The Deduction of Taxes is Not Only Collateral Matter to be Considered if Respondent is to Receive the Full Recovery Mandated by the F.E.L.A. 23

VI. The McWeeney Rule Is Prejudicial And Its Application Would Introduce Speculation Detrimental To Providing Full Compensation To An Injured Plaintiff 25

VII. Irrespective Of Future Changes In The Method Of Computation Of Loss Of Earnings The Defendant In The Instant Litigation Is Not Entitled To A Deduction For Future Taxes 26

A. Petitioner's Offer of Proof with Respect to the Issue of Future Taxes Was Deficient 26

B. The Testimony of Petitioner's Expert Would Have Been Barred in Any Event for Failure to Comply with Court Orders and the Illinois Supreme Court Rules Concerning Discovery Procedures 28

VIII. Instructing The Jury That An Award For Personal Injury Is Tax Exempt Denies Plaintiff Full Compensation For His Injury 29

PAGE

A. The Proposed Instruction is Prejudicial and Will Deny Plaintiffs Full Compensation for Their Injuries 29

B. The Proposed Instruction is Not a Correct Statement of the Law 30

C. The Jury in the Instant Case was Properly Instructed as to the Measure of Damages .. 31

IX. It Was Not Reversible Error To Refuse Petitioner's Instruction 34

Conclusion 35

Table of Authorities

Austin Liquor Mart, Inc. v. Dept. of Revenue, 18 Ill. App. 3d 894, 310 N.E. 2d 719 (1974) 27

Baker v. B. & O. Ry., 502 F. 2d 638 (C.A. Ohio 1974) 7

British Transport Comm'n. v. Gourley, A.C. 185, 3 All. E.R. 796 (1955) 20, 21

Burlington Northern Inc. v. Boxberger, 529 F. 2d 284 (9th Cir. 1975) 20, 21

Chesapeake & Ohio Ry. Co. v. Kelly, 241 U.S. 485 (1916) 15

Cox v. Northwest Airlines, Inc., 379 F. 2d 893 (7th Cir. 1975) 21

Cunningham v. Rderiet & Vendeggen A/S, 333 F. 2d 308 (2d Cir. 1964) 19

Dempsey v. Thompson, 363 Mo. 339, 251 S.W. 2d 42 (1952) 22, 34

Epmeier v. United States, 199 F. 2d 508 (7th Cir. 1952) 8

PAGE

Floyd v. Fruit Industries, 144 Conn. 659, 136 A. 2d 918 (1957) 21

Geris v. Burlington Northern Inc., 277 Or. 381, 561 P. 2d 174 (1977) 10, 13, 22

Gulf, Colorado & Santa Fe Ry. Co. v. McGinnis, 228 U.S. 173 (1913) 15

Hall v. Chicago & Northwestern Ry. Co., 5 Ill. 2d 135, 125 N.E. 2d 78 (1955) 30

Haynes v. U.S.A., 1353 U.S. 81 (1957) 8

Hession v. Liberty Asphalt Products, Inc., 93 Ill. App. 2d 65, 235 N.E. 2d 17 (1968) 27

Hort v. Commissioner, 313 U.S. 28 (1941) 8

Huddell v. Levin, 395 F. Supp. 64 (D.N.J. 1975), vacated and remanded, 537 F. 2d 726 (3d Cir. 1976) ..9, 17

Kansas City Southern Ry. v. Leslie, 238 U.S. 599 (1915) 14

Kerman v. American Dredging Co., 355 U.S. 426, 78 S.Ct. 394 (1958) 6

LeRoy v. Sabena Belgian World Airlines, 344 F. 2d 266 (2d Cir. 1965) 20, 21

Lumber Terminal, Inc. v. Nowakowski, 36 Md. App. 82, 373 A. 2d 282 (1977) 10

McWeeney v. New York, N.H. & N.R.R. Co., 282 F. 2d 34 (2d Cir. 1960) 12, 20, 21, 25

Michigan Central R.R. Co. v. Vreeland, 227 U.S. 59 (1913) 14

Moragne, etc. v. States Marine Lines, Inc., et al., 398 U.S. 417 (1970) 14

PAGE

Rodriguez v. McDonnell Douglas Corp., 151 Cal. Rptr. 399 (1978) 23

Sanchez v. Denver & Rio Grande W.R.R., 538 F. 2d 304 (10th Cir. 1976) 21

Sea-Land Services, Inc. v. Gaudet, etc., 414 U.S. 659 (1974) 14

Statutes

26 U.S.C. §104 (a) (2) 8, 9, 11

Ill. Rev. Stat. 1971 ch. 110A par. 219 (c) (iv) 28

Ill. Rev. Stat. 1971 ch. 110A, par. 237 (b) 28

Administrative Rulings

Rev. Rul. 54-19, 1954-1, Cum. Bull. 179 8

Rev. Rul. 79-220, I.R.B. 1979—30.5 10

Miscellaneous

IRS Publication 198, *Internal Revenue Service Preliminary Statistics of Income, 1975, Individual Income Tax Returns* (2-77) 13

IRS Publication 17, *Your Federal Income Tax* (1979) ch. 17, p. 71 30

United States Master Tax Guide, C.C.H., Inc., Vols. 1948-1979 18

63 A.L.R. 2d 1393, 1397 9

In the
Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1323

NORFOLK AND WESTERN RAILWAY COMPANY,

Petitioner,

vs.

KANDYTHE J. LIEPELT, Administratrix of the Estate of Delroy Liepelt, Deceased,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois, First District, First Division

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether this Court should reverse the policy prevailing in the majority of jurisdictions, both state and federal, of computing lost earnings on a gross wage basis?

   (a) Whether Congress intended that an admitted tortfeasor reap the benefit of the humanitarian exclusion of personal injury awards from taxation?

   (b) Whether Congress intended a jury in an F.E.L.A. case to sit as a tax court and speculate on numer-

ous income tax variables that may affect a decedent's earnings and tax status?

(c) Whether the consideration of the impact of taxation mandates the introduction of evidence with respect to other collateral matters which also affect the recovery which respondent will ultimately receive?

2. Whether it was error of reversible magnitude to refuse an inaccurate "cautionary instruction" to the effect that any damage award would not be subject to income tax?

STATEMENT OF THE CASE

1. As to Petitioner's assertion (Pet. Br. 4 Ftn.) that this accident was a result of vandalism, the jury and the Illinois Courts found adversely to the railroad on this purported defense. The Illinois Appellate Court's opinion adequately reviews the issue of liability, and that issue is not before this Court. The railroad's Petition for Certiorari and its brief do not contest the issue of liability.

2. Plaintiff's expert did not testify that decedent's estimated salary in the year 2000 (the date of decedent's projected retirement) would reach $51,000 (Pet. Br. 4; A 54-55).

3. The trial judge did not rule that defendant's offer of proof "was very properly made," but rather indicated that the comments made by the attorney for the Petitioner were correctly not made before the jury.

SUMMARY OF ARGUMENT

The position of the Petitioner, an admittedly negligent tortfeasor, requesting the reversal of the judgment entered against it in the Circuit Court of Cook County is untenable. By seeking a reduction in the amount of future lost wages

to which the Respondent is entitled, and which the railroad does not deny it was obligated to pay, the Petitioner is attempting to assert an unfounded claim to the tax benefit which Congress intended to bestow on persons killed or injured, when damage awards, health insurance benefits, and workmen's compensation payments are made.

The introduction of evidence of future taxation permits consideration of testimony, which, at best, is based upon speculation and conjecture as to future rates of taxation and numerous, indeterminate deductions. It will unnecessarily prolong trials and confuse jurors with complex calculations. Yet there has been no demonstration as to how these additional calculations will materially affect the jury's verdict.

If awards are to be uniform, and if, as the railroad admits, the Respondent is to receive full compensation for lost pecuniary benefits, then the approach which the Petitioner urges only goes halfway in its consideration of the taxation which must necessarily be accounted for to reach the desired result. After deductions for future taxes on lost income are made and the present value of future lost earnings is determined, then further calculations must necessarily be made to increase the award by the amount of tax which must be paid on the interest which any lump sum award will earn, or full recovery will not be realized.

Similarly, to provide full and complete recovery the impact of taxation is not the only collateral factor, which must be taken into consideration. In the instant case, an admittedly negligent tortfeasor was not willing to provide full recovery without the Respondent retaining an attorney and prosecuting this litigation through the highest level of appeal. Necessarily, when this litigation is resolved, the amount of her recovery will be reduced by the fees and

costs incurred. Therefore, if certain collateral matters are to be taken into account, then the jury must also be advised of the many deductions which will affect the amount the Respondent is to ultimately recover.

The railroad's thinly disguised attempt to defeat a full recovery by the Respondent is also well illustrated by its proposed "cautionary" instruction which is also a half measure, that will be more likely to misinform jurors than to instruct them as to the actual tax consequences which arise with respect to a lump sum award of damages. While it is true that the award itself is not subject to income tax, it is not true, as the instruction implies, that Respondent will never pay income tax on the proceeds of the award. Any interest earned on the award is subject to taxation as ordinary income. Accordingly, if a cautionary instruction is deemed necessary, then such an instruction should fully and completely relate the exact tax consequences which affect the award.

However, it is the position of the Respondent, that the proposed instruction, in addition to being incorrect, is also superfluous, in that it assumes that juries automatically disregard the instructions given to them by the Court. The Petitioner has offered no evidence for this claim, nor has any assertion been made that the instructions which the jury received were not properly formulated. Absent any showing that a compelling need has been demonstrated which requires that this type of instruction be given uniformly, there exists no basis for the reversal of the judgment of the lower court.

Irrespective of what action this Court may decide to take with respect to the issues raised herein, the Petitioner is not entitled to a new trial on the issue of damages with respect to the instant litigation. No evidence was offered during the trial of this cause to support Petitioner's contention that the calculation of the income tax consequences on decedent's loss of earnings would have materially changed the amount of the verdict returned by the jury. Further, Petitioner's offer of proof was totally deficient under Illinois law, and the witness whose testimony the attorney for the Petitioner sought to introduce was not properly disclosed as provided by court order. The Petitioner has no basis for any claim that a different outcome should result in the instant case.

As is demonstrated below, any change in the manner in which loss of wages is computed in an F.E.L.A. claim or the requirement that a mandatory instruction discussing the incidence of taxation be given would be a radical departure from the precedent followed by the majority of state and federal jurisdictions in this country. It is, therefore, the position of the Respondent that given the fact that the instant record is totally devoid of any evidence that the Petitioner did not receive a fair trial or that the judgment entered was excessive, any change in the current status of the law should be prospective only.

I.

INTRODUCTORY STATEMENT

Any discussion of the measure of damages in an F.E.L.A. claim must necessarily be put in the context of the purpose which the Federal Employer's Liability Act was designed to effectuate.

As this Court emphasized in *Kerman* v. *American Dredging,* 355 U.S. 426, 431-432, 78 S.Ct. 394 (1958):

> "But it came to be recognized that, whatever the rights and duties among persons generally, the industrial employer had a special responsibility toward his workers, who were daily exposed to the risks of the business and who were largely helpless to provide adequately for their own safety. Therefore, as industry and commerce became sufficiently strong to bear the burden, the law, the reflection of an evolving public policy, came to favor compensation of employees and their dependents for the losses occasioned by the inevitable deaths and injuries of industrial business. For most industries this change has been embodied in Workmen's Compensation Acts. In the railroad and shipping industries, however, the F.E.L.A. and Jones Act provide the framework for determining liability for industrial accidents. But instead of a detailed statute codifying common law principles, Congress saw fit to enact a statute of the most general terms, thus leaving in large measure to the courts the duty of fashioning remedies for injured employees in a manner analogous to the development of tort remedies at common law. *But it is clear that the general congressional intent was to provide liberal recovery for injured workers. Rogers* v. *Missouri Pacific R. Co.,* 352 U.S. 500, 508-510, and it is also clear that Congress intended the creation of no static remedy, but one which would be developed and enlarged to meet changing conditions and changing concepts of industry's duty toward its workers."

The questions raised herein do not merely revolve around a debate over a proper method of calculation of damages. There are more fundamental questions of public policy at issue. If it is true, as the Petitioner concedes, that an injured plaintiff should receive full recovery of all pecuniary benefits which have been lost as the result of the negligence of another, then the measure of damages employed to define that loss must necessarily be based upon gross wages which the admittedly negligent tortfeasor would have been obligated to pay. Whether or not the recipients of the award incur any tax liability is a collateral matter, which is not a relevant consideration to the tortfeasor's obligation. However, if policy dictates that consideration of collateral issues is of such consequence, which the Respondent denies, then many other relevant collateral factors which are also pertinent to the issue of pecuniary loss must be taken into account if the Respondent is to receive the full recovery which is consistent with the purpose and intent underlying the F.E.L.A.

II.

IT WAS NOT THE INTENT OF CONGRESS THAT STATE, AS WELL AS FEDERAL COURTS "STRICTLY LIMIT" RECOVERIES IN WRONGFUL DEATH ACTIONS TO THE VALUE OF THE NET PECUNIARY LOSS SUFFERED BY DECEDENT'S BENEFICIARIES.

> "The liberal purpose of this chapter must be kept in mind when confronting arguments which would restrict an employer's liability under this chapter." *Baker* v. *B. & O. Ry.,* (C.A. Ohio 1974), 502 F. 2d 638.

The social policy which motivated the enactment of the Federal Employer's Liability Act was the desire on the part of Congress to insure that railroad workers receive full compensation for injuries sustained as a result of the negligence of their employer. While it is conceded that

money can never make whole a plaintiff who has lost his limb or restore the life of a decedent, it would contravene the underlying social policy of the F.E.L.A. to permit an admitted wrongdoer to claim deductions and credits against an award of damages which a jury properly found fairly compensated the family of Respondent's decedent for the loss of his life.

A. An Admitted Negligent Railroad Should Not Obtain the Benefit of the Humanitarian Exclusion of Personal Injury Damage Awards from Tax Liability.

> "The provisions of Section 22 (b)(5) [1] undoubtedly were intended to relieve a taxpayer who has the misfortune to become ill or injured, of the necessity of paying income tax upon insurance benefits received to combat the ravages of disease or accident." *Epmeier* v. *United States,* 199 F. 2d 508, 511 (7th Cir. 1952) noted approval in *Haynes* v. *U.S.A.,* 1353 U.S. 81, 84-85.

The decision of Congress to exempt awards in personal injury and wrongful death actions bestows a humanitarian benefit on those individuals who have been injured through the misconduct of others.[2] The admitted tortfeasor herein

[1] Section 22(b)(5) was the predecessor section of Section 104(a)(2) and is identical to it.

[2] Petitioner contends that IRS §104(a)(2) was not intended to benefit wrongful death plaintiffs. (Pet. Br. 31-32, ft. nt. 23). Rev. Rul. 54-19, 1954-1, Cum. Bull. 179, relied upon by Petitioner, plainly does not concern the question as to whether wrongful death recoveries are to be treated as income, but rather concerns the issue whether a wrongful death recovery by beneficiaries is to be treated as income for *estate tax purposes,* in determining the gross estate of the decedent. Nor does *Hort* v. *Commissioner,* 313 U.S. 28, 31 (1941) shed any light on the question. The only authority cited by Petitioner in support of its contention that wrongful death recoveries are not covered by §104(a)(2) is pre-1939 ruling to the effect that

(footnote continued)

is now attempting to reap that benefit which was bestowed by Congress upon injured persons by making the fallacious claim that a damage award in which gross earnings form a part of the measure of damages is punitive and permits injured parties to receive a windfall.

The patent error in this assumption, upon which the railroad's entire theory is predicated, is that if the decedent had lived he would have only received his net wages. That is not true. The railroad would have had to pay the decedent gross wages. It would never be a concern of the railroad what, if any, income tax decedent paid to the government. Therefore, the gross wage basis upon which decedent's past and future wage loss was calculated was the proper measure of damages to be applied in this case, as it correctly described the amount of wages which the railroad would have owed to the decedent, if he had lived. Indeed, if Congress had intended that a benefit should be conferred upon negligent tortfeasors and had desired to alter the prevailing "gross wage" basis upon which lost earnings are calculated, it certainly could have amended the F.E.L.A. to reflect that policy. Since this has not been done, it is obvious that the benefit of the exclusion of personal injury damages from taxation belongs to the party to whom Congress granted the exclusion, the injured plaintiff.

Similar attempts by defendants to obtain the benefit of the tax considerations awards on personal injury have fre-

(footnote continued)
the Congress itself did not exempt wrongful death recoveries, but that the tax commissioner himself found that wrongful death awards were not to be treated as income to decedent's estate and not included in the estate for purposes of estate tax calculations. The courts which have considered the question in recent years, however, have viewed §104(a)(2) as being applicable to wrongful death recoveries. As noted in *Huddell* v. *Levin,* 395 F. Supp. 64, 87-89 (D.N.J. 1975) the court noted that wrongful death plaintiffs were certainly among the intended beneficiaries of §104(a)(2).

quently been rebuffed by courts in numerous jurisdictions.[3] As was aptly noted in *Lumber Terminal, Inc.* v. *Nowakowski*, 36 Md. App. 82, 373 A. 2d 282, 292:

> "Taxes are strictly between plaintiff as taxpayer and the government as collector, and are of no legitimate concern of the defendants. See e.g., *Atlantic Coast Line Railroad Company* v. *Brown*, 93 Ga. App. 805, 92 S.E. 2d 874. Although many defendants contend that because such recoveries are not taxable, a windfall is thus provided injured plaintiffs, that argument has a reverse effect. If an award were decreased by estimated taxes, the windfall would be one for the defendant, who has far less claim to it than the wage earner. The tax exemption was intended by Congress to benefit the injured party, not the wrongdoer."

Since the railroad has not suggested that, in fairness, a net wage calculation of future loss of wages would require that the railroad pay the projected lost wages to the I.R.S., and since there exists no provision in the Internal Revenue Code for the collection of those taxes, it is the admittedly negligent railroad herein which seeks the windfall, not the respondent. Given the expressed intent of the F.E.L.A. to provide liberal recovery to railroad workers who have been injured through the negligence of their employers and the humanitarian benefit that Congress has bestowed on those who have been victimized by the negligence of another, the position of the railroad is untenable. The benefit of the tax free status of personal injury and wrongful death awards should be given to the party for whom it was intended, and that party is the injured plaintiff and not the admitted wrongdoer.[4]

---

[3] See 63 ALR 2d 1394 and *Geris* v. *Burlington Northern, Inc.*, 561 P. 2d 174 (Ore. 1977).

[4] The intent of this benefit was reaffirmed recently in Rev. Rul. 79-220, I.R.B. 1979-30.5 which exempts annuity payments, as well as lump sum awards paid on account of injury or death. Further, the fact that these annuity payments may be made to the injured plaintiff's estate should he die prior to the expiration of the annuity contract in no way alters the exclusion.

The intent of Congress to bestow a benefit on the ill and injured is apparent from the wording of 26 U.S.C. 104(a)(2), Int. Rev. Code of 1954, §104(a)(2) which states:

> "Except in the case of amounts attributable to (and not in excess of) deductions allowed under Section 213 (relating to medical, etc., expense) for any prior taxable year, gross income does not include . . . (2) *the amount of any damages received* (whether by suit or agreement) on account of personal injuries or sickness . . ." (Emphasis added.)

The statute refers to damages in the past tense: "received". The government excuses the payment of tax after the injured party receives a judgment or settlement. The statute does not confer an anticipatory tax credit on anyone, particularly an admitted wrongdoer.

Finally, any claim by the railroad industry that the liberal Congressional purpose behind the enactment of the F.E.L.A. should now be constricted, because mismanagement by managerial employees has created financial strain on some railroad lines, is certainly not a relevant factor to be considered in connection with this claim. While attempting to usurp the benefit which Congress has bestowed on injured plaintiffs, the railroad ignores the fact that it is the recipient of numerous Congressional benefits and subsidies which far outweigh any amounts paid for injury related claims. Injury awards pursuant to the provisions of the F.E.L.A. cannot rationally be related to financial difficulties which plague some railroad companies, and such contention is particularly inappropriate in the instant case, where the Petitioner sought to be excused from the filing of an appeal bond, because of its vast net worth. Therefore, this litigation must be considered in the context of the social policy promoted by the F.E.L.A. and the Congressional intent underlying the tax considerations with respect to personal injury awards.

B. The Deduction of Future Taxes From Prospective Lost Wages is a Half Measure Designed to Defeat Full Recovery to the Respondent as Mandated by the F.E.L.A.

Although the railroad purports to claim that the Respondent is entitled to full recovery of lost pecuniary benefits, the use of net wages as the measure of damage with respect to the calculation of future lost wages, is deliberately designed to defeat that purpose. The deduction of future taxes from prospective lost wages in effect imposes a double tax upon the Respondent, because under the railroad's formula there exists no provision to take into account the taxes which must be paid on the interest, which any lump sum award will earn. The proposed calculations are only a half measure and do not fully describe all factors which must be taken into account. The inherent fallacy in the railroad's position was correctly described by the Second Circuit in *McWeeney,* (282 F. 2d at p. 37), where the Court noted:

> "Having duly instructed the jury on how to estimate the number of plaintiff's probable exemptions, and the dates when these will come into being, and on rate brackets and deductions, and the treatment of other income of the plaintiff not affected by the accident, the court would necessarily encounter another problem. Even the best designed instruction that stopped at that point would be unfair to the plaintiff. This is because, as proponents of the instruction recognized, the product of plaintiff's lost earning power ex-tax and his expectancy will have been discounted to produce 'that sum of money which if invested at a fair rate of return, will yield annually the amount by which the plaintiff's earning capacity has been lessened and which will at the time of the end of the plaintiff's life expectancy be reduced to zero.' This takes into account the fact that money earns interest each year; and it should be remembered that this interest is taxable. *Therefore, if a court is going to use income after taxes as a measure of plaintiff's loss, it must add back the taxes which would be due on the interest earned—else the award would not fully compensate for the loss.*" (Emphasis added).

Thus, if the railroad's position is developed to its appropriate and logical conclusion, juries will now be expected to perform complex and speculative computations to determine a net earnings figure. They will then have to formulate a second set of tax calculations to determine the prospective tax which the interest on the award will generate and adjust the award upward to reflect that amount. The only material difference which will result from the performance of these mathematical logistics is that trial and jury deliberation time will be significantly increased, further burdening an already clogged court system[5] and turning the focus of a jury from its true function. There will be little, if any, effect on the size of the award itself.

Therefore, when one considers the fact that the Internal Revenue Service Preliminary Statistics of Income, 1975, Individual Income Tax Returns, Publication 198 (2-77) p. 12 shows that the average wage earner with an adjusted gross income of $13,000-$14,000 paid approximately 9.4% of that income in taxes, and that a reduction of future loss of earning by that amount must be offset with an upward adjustment for the tax on the income that any award of damages would earn, the myriad calculations which the defendant would seek to have the jury perform are of negligible value. This same conclusion was reached by the Oregon Supreme Court in the case of *Geris* v. *Burlington Northern Inc.,* 561 P. 2d 174, 180 (Ore. 1977):

> "The benefits to be derived from the 'precision' approach to pecuniary loss are outbalanced by the greater potential of confusing and overwhelming the jury

[5] The congested condition of the nation's court system was recently commented upon by two Justices of this Court.

and protracting trial time. Even absent such imbalance, the benefit, as hereafter shown, may be miniscule and hardly worth the candle, for, when admittedly relevant evidence has a greater tendency on balance to frustrate rather than promote ultimate ends of justice, the trial court must exercise its discretion and refuse to admit it."

C. Petitioner's Contention That Respondent's Recovery Should Be "Strictly Limited" and Determined on the Basis of Net Pecuniary Loss is Not Well Founded.

The Petitioner's contention that damages in F.E.L.A. claims should be "strictly limited" in wrongful death actions to the net pecuniary loss suffered by decedent's beneficiaries is not supported by the authorities upon which the Petitioner relies. All of the cases cited by the Petitioner antedate the Sixteenth Amendment, are not related to the issues presented herein and are antiquated when considered in the context of the development of these Congressionally enacted remedies.[6]

Michigan Central R. R. Co. v. *Vreeland,* 227 U.S. 59 (1913) merely held that the loss of society and companionship of a spouse was not an element of *pecuniary* loss because those intangible factors could not be given a dollar value. (227 U.S. at p. 71). Petitioner asserts that *Kansas City Southern Ry.* v. *Leslie,* 238 U.S. 599 (1915) reversed a state judgment "because the instructions had allowed the jury to include in the award portions of the decedent's estimated gross earnings which would not have been contributed to the beneficiaries if there had been no accident." (Pet. Br. 19). Respondent fails to see how such propositions may be extracted from the terse holding in *Leslie.* The decision simply states that such instruction was improper but gives no exposition as to the basis for the holding. Therefore, petitioner has no basis for the claim that *Leslie* is clear authority for the "strictly limited" rule which petitioner purports to find in that case.

[6] See *Moragne* v. *States Marine Lines, Inc., et al.,* 398 U.S. 417 (1970) and *Sea-Land Services, Inc.* v. *Gaudet, etc.,* 414 U.S. 659 (1974).

Likewise, petitioner's citation of *Gulf, Colorado & Santa Fe Ry. Co.* v. *McGinnis,* 228 U.S. 173 (1913) is misplaced. Nowhere does the court in that case state that pecuniary losses are to be calculated with mathematical exactitude. Tne context in which the phrase "strictly limited" is employed in that case is that: ". . . damages for wrongful death are to be 'strictly limited' and apportioned to those statutory beneficiaries that sustained a loss." (228 U.S. p. 176).

The reasonable interpretation of the opinion is that damages for wrongful death are to be "strictly limited" to only those who are recognized as beneficiaries under the statute, i.e., those who are eligible for an award rather than the actual amount to be awarded.

In *Chesapeake & Ohio Ry. Co.* v. *Kelly,* 241 U.S. 485 (1916) also relied upon by petitioner, the court required that all lump sum awards under F.E.L.A. were to be discounted to present value. Such a holding is a far cry from the position that "pecuniary loss" is to be "strictly limited to net loss after application of income tax consequences."

III.

THE DEDUCTIONS TO WHICH THE ADMITTED WRONGDOER CLAIMS TO BE ENTITLED ARE SO SPECULATIVE THAT ANY ATTEMPT AT CALCULATION WOULD SEVERELY PREJUDICE THE RESPONDENT FOR WHOSE BENEFIT THE F.E.L.A. HAS BEEN ENACTED AND DENY FULL RECOVERY.

> "An equally compelling reason for excluding the consideration of income tax consequences is that they are collateral to the true issues of the litigation, and would unduly confuse and complicate a jury trial. There is certainly no speculation concerning the incidence of taxation, but the amount of tax which might be assessed against a given individual is a truly complex question. The number of possible exemptions, the type and amount of deductions, the effect of tax exempt earnings, tax shelters and investment earnings, together with a host of other variables, makes any realistic prediction impossible. Unlike economic growth, which is controlled by reasonably fixed principles of economic management, taxes are the creation of a political body, and therefore subject to change from session to session in Congress. Since the enactment of the Sixteenth Amendment, tax rates have changed an average of every three years, and more frequently in recent years. The tax advantage of professional corporations were not considered ten years ago. Tax shelters and permissible deductions are changed, created, modified or eliminated literally with every Congress.
>
> The difficulty of predicting the future of the tax code and its applicability to unknown individual decisions of a taxpayer is compounded by the confusion between the jury's traditional role as a fact-finder and the need to make legal determinations in considering tax consequences. For example, the jury would not only have to predict whether an individual would take advantage of certain tax shelters, the existence of which the jury would also have to predict, but would also have to determine whether the individual would be legally entitled to those shelters. Predictably, there would be legal disputes over such issues as the availability of professional corporation status, the amount and period of withholding income from taxation under retirement plans, the amount and type of legitimate business deductions, the availability of carry-backs, carry-forwards, and income-averaging, and the applicability of differing tax rates to different types of income. Most lawyers spend a full year in law school just to familiarize themselves with basic income tax law, state judges are never exposed to federal tax issues; and even federal judges are rarely exposed to such complicated tax problems. The possibility of conflicting expert testimony extending the average trial by at least a day is not remote. Even then, the trial judge and counsel, much less a lay jury, could not realistically be expected to face this task with other than utmost confusion." *Huddell* v. *Levin*, 395 F.Supp. 64, 90-91 (D. N.J. 1975) vacated and remanded, 537 F.2d 726 (3d Cir. 1976).

It is axiomatic that there is nothing certain in life but death and taxes. However, the amount of tax which a man will pay over his lifetime is a matter of pure conjecture. For the previous thirty years the Internal Revenue Service has not only changed the rate under which a wage earner such as Delroy Liepelt paid income tax, but there have also been numerous, significant adjustments in the manner in which adjusted gross income and taxable income have been calculated, which have materially affected the amount of tax which plaintiff would actually pay. The following are a few illustrations of some of the significant revisions which have occurred in the past thirty years:

a. The amount of personal exemption has been increased from $500.00 in 1947 to $750.00 in 1972;

b. The amount of the standard deduction has been increased from $500.00 in 1947 to $3,200.00 in 1977;

c. The minimum and maximum tax rates have changed from 88% maximum and 17% minimum in 1947 to 70% maximum and 14% minimum in 1965;

d. A $600.00 deduction for child care expenses, which was introduced in 1954 has been changed to a tax credit of up to 20% of the cost up to $4,000 in 1978.

e. In 1975 the Employment Retirement Security Act permitted individuals who were not in qualified pension plans to deduct 15% of their earned income up to $1,500.00 for contributions made to an individual retirement account;

f. In 1973 finance charges on bank credit cards, gasoline credit cards and department store charge accounts were permitted to be deducted as interest; and

g. Deductions for medical expenses were 5% of adjusted gross income with a $2,500.00 maximum in 1947 and have been repeatedly increased until the maximum limit was removed in 1967.[7]

The above examples illustrate recent changes which tend to reduce the amount of tax that an individual such as Delroy Liepelt would be required to pay. It is impossible to speculate as to how further deductions or changes in the rate of tax might effect the amount of tax which a lower income wage earner would owe. Therefore, the computation of future taxes at current rates would not reflect the actual pecuniary loss to the respondent and would deny respondent the full recovery to which the petitioner admits she is entitled.

[7] United States Master Tax Guide, C.C.H. Inc. Vols. 1948-1978.

Further, contrary to the petitioner's assertion, the calculation of taxes even for the ordinary wage earner is not simple. The existence of nationwide tax service firms like H & R Block, as well as the I.R.S. Taxpayer Assistance Program, the I.R.S. Service which computes tax for taxpayers, and the millions of errors in tax computation which the I.R.S. corrects every year belie this contention. In effect, the evidence which the petitioner seeks to introduce would require a jury to sit as a tax court listening to speculative evidence to determine what the future tax liabilities of the decedent might have been, and to determine a figure based on pure conjecture. And, as noted above, the same calculations would then be repeated employing the same dubious figures to arrive at the potential tax consequences on the interest earned by a lump sum award. Such mental gymnastics invite error, in most cases will not materially alter the actual award given, and detract from the primary determinations which a jury should make. For these reasons a majority of jurisdictions have rejected attempts to introduce such collateral matters into this type of litigation and have repeatedly held that "gross earnings" are the proper measure of damages for the computation of future lost wages. As was determined by the Second Circuit in *Cunningham* v. *Rderiet & Vendeggen A/S*, 333 F.2d 308 (2d Cir. 1964, at p. 314):

> "The argument has a certain gloss of persuasiveness about it, due no doubt to its neatness and simplicity, but a careful analysis of respondent's reasoning convinces us that the argument completely misses the point. That New York's wrongful death act permits recovery for only pecuniary losses suffered by a decedent's distributees aids respondent not one whit. The courts in the *McWeeney* and *Montillier* cases supra, and for that matter, *every court which has ever undertaken to estimate damages resulting from the loss of future earnings, were concerned with the*

amount of 'pecuniary losses' sustained by an aggrieved party. The crucial issue, is not, as respondent would have us believe, simply whether libellant would ever have received any of that portion of decedent's future earnings which would have been withheld for taxes. Rather, the crucial issue is *whether a court can predict with sufficient certitude* [*certainty*] *just what portion of decedent's earnings would have been placed beyond libellant's reach by future tax laws so as to permit the court justly to reduce the damage award which libellant would otherwise be entitled to.* . . . Because of *the speculative nature of any deduction for future income taxes,* the court below should calculate libellant's damage award on the basis of her husband's *future gross income before taxes.*" (Emphasis added).

IV.

PERMITTING SPECULATION ON THE IMPACT OF FUTURE TAXES WILL RADICALLY ALTER THE SYSTEM OF INJURY COMPENSATION THROUGHOUT THE ENTIRE COUNTRY.

Contrary to petitioner's contention, there is no emerging trend in favor of the "net earnings" rule in the various state and federal courts across the country. The list of "many courts" which petitioner contends have adopted a "net earnings" rule (Pet. Br. 14 ft. nt. 5) is not persuasive: *British Transport Comm'n.* v. *Gourley,* (1956) A.C. 185, 3 All E.R. 796 is plainly inapplicable since in Britain damages are traditionally assessed by the court and an award of attorneys fees is made to the prevailing party. See: 63 ALR 2d 1393, 1397. The two federal appeals court decisions cited by petitioner: *Burlington Northern Inc.* v. *Boxberger,* 529 F.2d 284 (9th Cir. 1975) and *LeRoy* v. *Sabena Belgian World Airlines,* 344 F.2d 266 (2d Cir. 1965) did not in fact adopt a flat "net earnings" rule but applied the so-called "modified gross earnings" principle enunciated in *McWeeney* v. *York, N.H. & R.R. Co.,* 282 F.2d 34

(2d Cir. 1960). Even if *McWeeney* were followed, the "gross earnings" rule observed by the Illinois trial court would still be proper because decedent's annual earnings placed him in the lower income tax brackets.

Petitioner fails to cite a single case in which any court has squarely held that the "net earnings" rule should be applied in *all* cases. Petitioner's quotation from *Burlington Northern Inc.* v. *Boxberger,* 529 F.2d 284, 294 (9th Cir. 1975) (Pet. Br. 32) is inappropriate. The quotation is dictum that a "net earnings" rule might be preferable, but the court in fact followed the "modified gross earnings" test of *McWeeney.*[8] Petitioner's quotation from *Floyd* v. *Fruit Industries,* 144 Conn. 659, 136 A.2d 918 (1957) (Pet. Br. 23) is out of context. In *Floyd,* which preceded *McWeeney,* the Connecticut Supreme Court did not posit a net earnings rule for *all* cases, but held that, where the tort victim's income was substantial ($50,000 per year in 1957), the offset of income taxes should be considered. Query, whether the court would have so held if the income were substantially less?

Most curious are petitioner's citations in support of its claim that "many courts" have adopted a "net earnings"

---

[8] Examination of petitioner's other citations reveals that those courts did not adopt the "net earnings" rule, but variations of the *McWeeney* modified "gross earnings" approach: In *British Transport Comm'n* v. *Gurley,* (1956) A.C. 185, 3 All E.R. 796, the Court noted that income taxes would have significant impact upon the amount awarded. Thus the case is the British version of the *McWeeney* rule. *LeRoy* v. *Sabena Belgian World Airlines,* 344 F.2d 266 (2nd Cir. 1965), *Cox* v. *Northwest Airlines, Inc.,* 379 F.2d 893 (7th Cir. 1975), and *Burlington Northern Inc.* v. *Boxberger,* 529 F.2d 284 (9th Cir. 1975) (all cited by petitioner's Br. 23, ft. nt. 16 were all applications of the *McWeeney* criterion. *Sanchez* v. *Denver & Rio Grande WRR,* 538 F.2d 304 (10th Cir. 1976) held that income tax consideration should be left to the trial court's discretion. (538 F.2d at p. 315).

rule, of *Dempsey* v. *Thompson,* 363 Mo. 339, 251 S.W.2d 42 (1952) and *Geris* v. *Burlington Northern,* supra. Far from adopting the "net earnings" rule, the court in *Dempsey* flatly refused to permit the jury to consider the impact of taxation on future earnings and held:

> "[T]he general rule that an award of damages for loss of future earnings should be based strictly on actual pecuniary loss cannot be rigidly adhered to so far as it may be impossible to compute with reasonable accuracy the amount of income tax liability that may attach thereto. . . . *Too many unforseeable and variable factors would enter into any attempted computation of income tax liability on loss of future earnings to permit of any reasonably accurate estimate thereof.*" (251 S.W.2d at pp. 43-45) (Emphasis added).

and in *Geris* the Supreme Court of Oregon observed, in rejecting the "net earnings" position:

> "[N]o federal court has ever held that evidence of the projected effect of taxes on plaintiff's damages is *always* admissible." (561 P.2d at p. 177), and
>
> "At least 29 state courts have also considered this specific question. The vast majority hold that evidence of the impact of taxation on plaintiff's damages is not admissible." (ft. nt. 4).

The Oregon court is correct. There exists no emerging trend among either state or federal jurisdictions to support petitioner's contention that the respondent's recovery should be "strictly limited" to the net pecuniary loss to decedent's beneficiaries.

A further consideration is the effect that any change in the prevailing "majority rule" will have on other forms of injury compensation. As we have stated before the Congressional intent to benefit injury victims with a tax exemption is clear. Awards for personal injury lawsuits are not the only exception. Workmen's compensation benefits, Social Security disability awards, insurance disability awards and medical and life insurance payments are based on gross wages and are also exempt. Since the intent to bestow a benefit on any injured person is clear, a change of that policy by this Court with respect to personal injury lawsuits will obviously effect all types of injury compensation, if all injured parties are to be treated equally. Surely the underlying social policy of full compensation to injury victims will be frustrated if those who are required by law to compensate injured persons obtain the tax benefit intended for the injured party by Congress.

V.

IF TAXES ARE TO BE DEDUCTED FROM PERSONAL INJURY AWARDS OTHER OFFSETTING FACTORS MUST BE TAKEN INTO ACCOUNT TO MAKE THE PLAINTIFF WHOLE.

The Deduction of Taxes is Not the Only Collateral Matter to be Considered if Respondent is to Receive the Full Recovery Mandated by the F.E.L.A.

> "[S]ince the aim of the legal rule that would permit a jury to take future tax consequences into account in fixing the amount of an award is to determine the *net* loss to a plaintiff, a logical sequel would mandate that a jury be permitted to know the consequences to the plaintiff of the latter's obligation, customary in personal injury and wrongful death litigation, to pay attorney's fees from the award—a consideration that is now deemed so impermissible that its use by the jury constitutes jury misconduct, necessitating reversal of the judgment." (Emphasis the court's). *Rodriguez* v. *McDonnell Douglas Corp.,* 151 Cal. Rptr. 399, 423 (1978).

Once again the inherent inconsistency in the position of the Petitioner is highlighted by the "half measure" approach which it takes in defining what constitutes "full

recovery." There exists no rational basis for the claim that taxes should not be considered a private matter between the taxpayer and the government, but that the fees and costs necessarily incurred in the prosecution of litigation are a private matter between attorney and client and not a relevant factor in determining the amount of the Respondent's recovery. The railroad by its own admission concedes that the purpose of the award is to make the Respondent whole. Yet this admittedly negligent tortfeasor refused to provide to the Respondent a full recovery without extensive litigation to the highest level of appeal. Because of this Petitioner cannot reasonably assert that only certain deductions for taxation should be computed to reduce the award, while ignoring other relevant collateral matters which ultimately affect the amount of the recovery which the Respondent will receive. Such an approach severely prejudices the party who has been wrongfully injured, does not provide full recovery, and gives a windfall to an admitted wrongdoer.

Similarly, a true net loss rule would require thorough and realistic consideration of the factor of inflation. While Petitioner argues that "the remedy would be in making future inflation a relevant consideration, not in refusing to allow the jury to consider factors such as income tax" (Pet. Br. 30, ft. nt. 21), the vice of such suggestion is to open wide the courthouse door to a multiplicity of speculative and collateral issues beyond the reasonable and practicable scope of personal injury trials.

Finally, Petitioner's suggestion that permitting consideration of attorney's fees would require Congressional action in view of the firmly entrenched practice of excluding attorney's fees from the jury, is not helpful. For the same reason, in view of the firmly entrenched practice of excluding income tax considerations from personal injury trials,

it is also reasonable to assert that Congressional action should also be required to permit consideration of tax consequences.

VI.

THE McWEENEY RULE IS PREJUDICIAL AND ITS APPLICATION WOULD INTRODUCE SPECULATION DETRIMENTAL TO PROVIDING FULL COMPENSATION TO AN INJURED PLAINTIFF.

For the reasons outlined below, it is the position of the Respondent that the adoption of a "McWeeney" type rule would introduce speculation detrimental to providing full compensation to an injured plaintiff. However, if the implementation of a modified gross earning rule is deemed appropriate, the adoption of that rule should in no way reverse the outcome of the instant litigation. In *McWeeney* the court held that income taxes should *not* be deducted in "the great mass of litigation at the lower end of the income spectrum." (282 F. 2d at p. 39).[9] Therefore, in the instant case, since the record is entirely devoid of any showing that taxation would have significant impact with respect to the calculation of future lost wages, there is no basis for the contention that the Petitioner was prejudiced by the use of the "gross wage" standard as the measure of damage for the computation of future wage loss.

If this Court recognizes the principle that Congress intended to benefit persons injured through a tax exemption for personal injury awards, then the introduction of a "modified gross earnings" rule would prejudicially affect

[9] In 1960 the *McWenney* Court was of the opinion that if a plaintiff had an earnings potential of $100,000 per year deductions for future taxation might be of some consequence. (282 F.2d at p. 38). Decedent's annual projected lost income for the year 2000 in the instant litigation, as computed in 1976, was less than one-half that amount.

the benefit which was intended to be conferred. The IRS exemption does not apply only to injured plaintiffs in a certain tax bracket. It applies generally. Therefore, any ruling which would confer the benefit to a certain class of plaintiffs, but eliminate it for others is a denial of equal protection. To permit hundreds of individual trial judges across the country to speculate as to when annual gross income is "substantially" affected by taxes would hardly bring a uniformity in damage awards, which the Petitioner claims that it desires. If left to the discretion of the individual trial judge, local experience, bias and prejudice will create a marked differential in what plaintiffs with identical earning histories may recover as damages. The Congressional benefit conferred through the tax exemption should not be dependent upon a plaintiff's tax bracket.

VII.

IRRESPECTIVE OF FUTURE CHANGES IN THE METHOD OF COMPUTATION OF LOSS OF EARNINGS THE DEFENDANT IN THE INSTANT LITIGATION IS NOT ENTITLED TO A DEDUCTION FOR FUTURE TAXES.

A. Petitioner's Offer of Proof with Respect to the Issue of Future Taxes Was Deficient.

There is no competent evidence in the instant record to justify Petitioner's position that the application of the "net earnings" rule would have resulted in any significant reduction of the jury verdict. The "offer of proof" made by the attorney for the Petitioner merely consisted of an unsupported statement that there would be a reduction of $57,000 (A-35-36) in the amount of decedent's lost earnings if the impact of future taxation was considered. No testimony was offered with respect to a number of variables, including the type and number of exemptions and

deductions or the applicable rates of taxation over the decedent's life expectancy, to substantiate this conclusion. Absent such data, the trial court was unable to determine the competency of the income tax figures proffered by Petitioner. Therefore, under State law, the offer of proof is clearly insufficient to establish that any prejudice resulted to Petitioner by the Court's refusal to admit evidence concerning the impact of taxation on decedent's lost earnings.

> "To some extent, the requisite formality of an offer of proof will depend upon the circumstances of the particular case. Where it is obvious that the witness is competent to testify to a fact, and it is obvious what his testimony will be if he is permitted to give it, a brief statement by counsel may suffice. *Schusler* v. *Fletcher*, 74 Ill.App.2d 249, 253, 219 N.E. 2d 588 (1966). In a case such as this, however, where it is by no means clear what the witness will say, or what his basis will be for saying it, the offer of proof must be considerably more detailed and specific than the statement counsel made here. Only in this way can a reviewing court know what was excluded and determine whether the exclusion was proper. (Emphasis added.) *Hession* v. *Liberty Asphalt Products, Inc.*, 93 Ill. App. 2d 65, 71, 235 N.E. 2d 17, 20 (1968).

See also *Austin Liquor Mart, Inc.* v. *Dept. of Revenue*, 18 Ill. App. 3d 894, 906, 310 N.E. 2d 719 (1974).

Since the Petitioner's entire argument is predicated on the erroneous assumption that the "net earnings" rule is to be applied in all F.E.L.A. cases, and since the record in the instant case is totally devoid of any evidence which indicates that the application of the "gross earnings" rule operated to prejudice the Petitioner, there is no basis for the claim that the verdict was excessive.

B. The Testimony of Petitioner's Expert Would Have Been Barred in Any Event for Failure to Comply with Court Orders and the Illinois Supreme Court Rules Concerning Discovery Procedures.

(a) Notice to Parties et. al., The appearance of a party or a person who at the time of the trial is an officer, director, or employee of a party may be required by serving the party with a notice designating the person who is required to appear. The notice also may require the production at the trial of documents or tangible things. If the party or person is a non-resident of the county, the court may order any terms and conditions in connection with his appearance at the trial that are just, including payment of his reasonable expenses. Upon a failure to comply with the notice, the court may enter any order that is just, including any order provided for in rule 219(c) that may be appropriate. Ill. Rev. Stat. 1971 ch. 110A, par. 237(b).

(b) Failure to Comply with Order or Rules. If a party or any person at the instance of or in collusion with a party, unreasonably refused to comply with any provision of rules 201 through 218, or fails to comply with any order entered under these rules, the court, on motion, may enter, in addition to remedies elsewhere specifically provided, such orders as are just, including, among others, the following:

(iv) that a witness be barred from testifying concerning that issue; Ill. Rev. Stat. 1971 ch. 110A. par. 219(c)(iv).

During the trial of this action when the attorney for the Petitioner attempted to introduce the testimony of its actuary, counsel for the Respondent properly objected to this attempt, since the attorneys for the Petitioner had not complied with the requirements of Illinois Supreme Court Rule 237 and the trial court's order concerning the disclosure of witnesses. (App. pp. 77-79). Because of this failure, and since the record is totally devoid of any other evidence of what, if any, impact future taxes may have had on the award, Respondent is entitled to the full amount of the judgment which the jury determined she was to receive.

VIII.

INSTRUCTING THE JURY THAT AN AWARD FOR PERSONAL INJURY IS TAX EXEMPT DENIES A PLAINTIFF FULL COMPENSATION FOR HIS INJURY.

A. The Proposed Instruction is Prejudicial and Will Deny Plaintiffs Full Compensation for Their Injuries.

"Further, the jury was correctly instructed on the measure of damages, being told specifically the elements that they should consider in awarding damages. Hence, unless it be assumed that they might not follow the instructions, there could be no purpose in mentioning anything about the award not being subject to Federal income tax. However, by the very nature of the jury system this court cannot indulge the presumption that juries do not follow the instructions of the courts.

It does not necessarily follow that the argument is proper because it correctly states the law. For if the defendant's argument is proper on the basis that it tells the jury what the law is then what objection can there be for plaintiff's counsel to state that the expense of trial is not provided for in the instruction concerning damages, that the cost of medical witnesses is not paid by the defendant, that the expense of taking depositions, as well as court reporting at the trial, must be borne by the individual litigants, that the fees of plaintiff's attorney are not recognized as an element, that the defendant can deduct any award it pays from its

> income and excess profits tax return and that the amounts of awards are allowed as expenses in providing for increasing railroad fares? This could be developed ad infinitum, and all this is the law." *Hall* v. *Chicago & Northwestern Railway Co.*, 5 Ill. 2d 135, 125 N.E. 2d 78, 85 (1955).

There exists no reason for the assumption that jurors automatically disregard the court's instructions with respect to elements of damages to be awarded to an injured plaintiff and overcompensate plaintiff for the amount of an assumed tax. On the contrary, it must necessarily be assumed that jurors follow the court's instruction. It is also reasonable to assume that jurors are aware of the tax exemption. For example, the instruction book for preparing individual tax returns, which is available to all taxpayers, including potential jurors, clearly sets forth that damages are exempt. (I.R.S. Publication 17, Your Federal Income Tax 1979 Edition, ch. 17, p. 11). Given these well founded premises, the Petitioner has totally failed to demonstrate the need for a cautionary instruction.

Rather, the proposed instruction is a half measure which will prejudice a plaintiff and deny full compensation, as it will cause jurors to attempt to adjust an award, reducing it by an amount of an imagined tax. Since freedom of taxation on the award is intended as a benefit to the injured party, it is the wrongdoer who will receive a windfall to the detriment of the Respondent. Accordingly, to instruct the jury that the award is tax free will defeat the purpose of the Congressional benefit and deny the full compensation due to the Respondent.

B. The Proposed Instruction is Not a Correct Statement of the Law.

If a jury is instructed that an award is tax free such instruction will further prejudice an injured party, because it is only a half measure, since it does not further

state that any interest earned on the award is taxable as ordinary income. Because all damage awards must be reduced to present value to take into account the earning power of a lump sum award, it is implicitly assumed that the award will be invested and produce income which will replace the income lost over the work life expectancy. Since the interest earned on the lump sum is taxable to the recipient, any instruction which advises the jury that the award is non-taxable, must also explain that it is the lump sum which is not taxed, but any income earned on that award will be susceptible to ordinary income tax. Unless this is done respondent will be penalized by the jury's assumption that she will never pay any tax for the duration of her life, and thereby deny her the full compensation to which she is entitled for this injury.

C. The Jury in the Instant Case Was Properly Instructed As to the Measure of Damages.

> "The plaintiff Kandythe Liepelt brings this action in a representative capacity by reason of her being the administrator of the estate of Delroy Liepelt, deceased. The persons she represents are the widow and next of kin of the deceased, namely, Kandythe Liepelt, Carolyn May Liepelt, Marilyn Kay Liepelt, Corey Allen Liepelt and Kyle Stanton Liepelt. They are the parties in interest in this lawsuit and in that sense are the real plaintiffs, whose damages you are to determine if you decide for the administrator of the estate of Delroy Liepelt.
>
> If you decide for the plaintiff on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the survivors of the decedent for any pecuniary loss they have suffered and for any pecuniary loss they are reasonably certain to suffer in the future by reason of the death of the decedent.

In arriving at the amount of damages for the loss of future pecuniary benefits, you must determine the present cash value of the future pecuniary benefits the decedent's survivors were reasonably certain to receive, making allowance for the earning power of money.

To determine the pecuniary loss suffered by each survivor as a result of the death of Delroy Liepelt, the decedent, you should consider what benefits of pecuniary value, including money, goods and services, the evidence shows that the decedent customarily contributed to each survivor. You should also consider what the decedent was earning and what he would have been likely to earn in the future, in view of his earning capacity, habits of industry and thrift, his health, his age, and life expectancy at the time of his death.

You should also consider the personal expenses of decedent and other deductions from his earnings. Consider also how long each survivor would have been likely to receive pecuniary benefits from the decedent if he had lived. Consider also all other facts shown by the evidence which aid you in determining what pecuniary benefits it might reasonably be expected each survivor would have received from the decedent, if the decedent had not met his death.

Some of the survivors are the minor children of the decedent. As to these survivors, you may award an amount to compensate the children for the pecuniary value of any loss of care, attention, instruction, training, advice, and guidance the decedent would have been likely to give his children during their minority if decedent had continued to live.

The contributions and benefits which you may consider must be only those contributions and benefits upon which a money value can be placed. You are not permitted to award any amount for the grief or loss of society and companionship caused any survivor by the death of Delroy Liepelt. (App. 83-84) (Emphasis added.)

The jury in the instant case was properly instructed as to the elements of damage which it should consider in connection with the death of Delroy Liepelt. There exists no basis for the assumption that the award was excessive, or that it included compensation for other than those factors properly described in the damage instruction. The Respondent presented ample evidence on all elements of damage to support the award which the jury rendered. Future loss wages was only one of the factors which the jury was asked to consider in connection with the items of damage, and therefore, no basis exists for the assumption that Respondent was compensated for an imaginary tax. Indeed, the jury was asked by counsel for the Respondent for an award of $1,000,000.00. It could just as easily be hypothesized that the jurors deducted $225,000.00 to reduce Respondent's award for an amount of future taxes that would not be collected.

Realistically there is no reason to assume that the jury disregarded the instruction given to them in this case, or that juries routinely disregard instructions on damages or on other issues in personal injury cases. That is tantamount to saying that no party to a personal injury lawsuit ever had a fair trial, which is obviously not correct. One must believe that jurors customarily follow the court's instructions and award damages in accordance with the elements outlined therein. The instant instruction contained no reference to taxes, so there exists no basis for assuming that the Respondent received additional compensation for an imagined tax. Further, the question of an excessive verdict has not been presented to this court for its consideration, so there exists no rationale for the Petitioner's contention that the ward was improper for all the elements of loss which were demonstrated at trial.

IX.

IT WAS NOT REVERSIBLE ERROR TO REFUSE PETITIONER'S INSTRUCTION.

To permit the introduction of evidence concerning the impact of taxes on future loss of earnings or to instruct a jury that an award of damages is not subject to taxation would be a radical departure from the manner in which damage awards are assessed in the vast majority of state courts and the majority of the federal circuits. At the time this case was tried the evidence which the Petitioner sought to introduce and the instruction which it tendered would have only been permitted in a small minority of the courts in this country. Therefore, the trial court and the Respondent correctly relied on the prevailing consensus of legal decisions with respect to these two questions. If there is to be a departure from the precedents followed by the majority of jurisdictions, it should not affect this litigation. As the Court in *Dempsey* v. *Thompson,* 251 S.W.2d 42, at pp. 45-56 (Mo. 1952), noted:

> "It cannot be demonstrated that the jury did not follow those instructions, and our holding that the refusal to give the additional cautionary instruction hereinabove discussed is not based on any assumption the jury did not follow given Instructions Nos. 1 and 5. Rather, it is based on the theory that such an instruction should be given in order to avoid the imminent possibility of juries being led astray due to their likely ignorance of the fact that awards such as is here involved are not subject to income taxes. Under these circumstances . . . it would be harshly unjust to subject plaintiff to the ruling herein made. Therefore, we hold that this ruling shall be prospective only."

Similarly, in the instant case the Petitioner has completely failed to demonstrate that the jury did not follow the instructions given to it by the Court, and the record is

totally devoid of any indication that future taxes would have played any significant role in the computation of the decedent's lost wages. Therefore, this award must be affirmed.

Conclusion

For the foregoing reasons the judgment of the Illinois Appellate Court, First District, First Division, should be affirmed.

Respectfully submitted,

RICHARD S. FLEISHER
TONI MCNAMARA
KARLIN AND FLEISHER
111 West Washington Street
Chicago, Illinois 60602
312-346-8620
Attorneys for Respondent

SIDNEY Z. KARASIK
Of Counsel